(7)

No. 84-1465

Office - Supreme Court, U.S.
FILED
MAY 22 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS AMBROSE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney
Washington, D.C. 20530
(202) 633-2217

12PP

QUESTION PRESENTED

Whether a person may be convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, on an aiding and abetting theory.

TABLE OF CONTENTS

	Page
Opinion	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Breeze v. *United States*, 398 F.2d 178	5
Busic v. *United States*, 446 U.S. 398	6
Standefer v. *United States*, 447 U.S. 10	5
United States v. *Jones*, 678 F.2d 102	5
United States v. *May*, 625 F.2d 186	5
United States v. *Mitchell*, No. CR 83-130 (1983)	8
United States v. *Ruffin*, 613 F.2d 408	6
United States v. *Southard*, 700 F.2d 1, cert. denied, 464 U.S. 823	5
Wilson v. *United States*, 230 F.2d 521, cert. denied, 351 U.S. 931	6

Statutes:

18 U.S.C. 2	2, 3, 4
18 U.S.C. 1951	2
18 U.S.C. 1962(c)	2
21 U.S.C. 848	2, 4, 6
21 U.S.C. 848(a)	4
21 U.S.C. 848(b)(2)(A)	7
26 U.S.C. 7214(a)(2)	5

Miscellaneous:

H.R. Rep. 91-1444, 91st Cong., 2d Sess. (1970)	6-7
S. Rep. 91-613, 91st Cong., 1st Sess. (1969)	6

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1465

THOMAS AMBROSE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 740 F.2d 505.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1984. A petition for rehearing was denied on January 15, 1985. The petition for a writ of certiorari was filed on March 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, each petitioner was convicted on three counts of aiding and abetting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 and 18 U.S.C. 2, and on two counts of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). In addition, petitioners Guide and Haas were convicted on six counts, petitioner Derango on five counts, and petitioner Ambrose on four counts of extortion, in violation of 18 U.S.C. 1951. The court of appeals affirmed petitioners' convictions but remanded for resentencing (Pet. App. 1a-19a). After remand, each petitioner was sentenced to concurrent terms of 18 years' imprisonment on the racketeering and certain of the extortion counts. Each petitioner was also sentenced to 12 years' imprisonment, without parole, on the CCE counts, with those sentences to run concurrently to each other and to the 18-year sentences. Finally, imposition of sentence on certain of the extortion counts was suspended in favor of five years' probation.

The evidence at trial shows that petitioners, all former Chicago police officers, protected two large drug distributorships in Chicago's Marquette district over a three-year period. Specifically, they warned the distributors of impending raids and of the presence of honest police officers in the area; failed to arrest the distributors or their employees and ignored complaints from citizens about the activities of the distributors; caused cases against the distributors or their employees to be dismissed in state court by writing false arrest reports; seized narcotics from competing narcotics operations and delivered them to

the distributors; beat up and threatened to kill a drug dealer who was competing with the distributors; and diverted addict traffic from competing operations to the distributors. In exchange for their efforts in behalf of the protected distributors, petitioners received money, weapons, and other things of value (Tr. 801-1162, 2973-3250; Pet. App. 1a-2a).

2. Petitioner's CCE convictions rested on the theory that they had aided and abetted the kingpins to run the drug enterprise. At trial, petitioners unsuccessfully moved to dismiss the CCE count on the ground that the aiding and abetting statute, 18 U.S.C. 2, does not apply to a CCE offense.

On appeal, the court of appeals likewise rejected this contention. The court observed that the kingpin's nonsupervisory employees—such as runners, mixers, and look-outs—could not be punished as his aiders and abettors because that would undermine Congress's purpose of providing "differential punishment for the kingpin" (Pet. App. 3a). It concluded, however, that petitioners could be convicted as aiders and abettors, reasoning that they were "not the kingpin's employees, but the kingpin's police protectors." *Ibid.* The court explained (*id.* at 3a-4a):

> Congress probably would have wanted [the kingpin's police protectors] to be punishable, in an appropriate case, as severely as the kingpins themselves. It is difficult for a large illegal enterprise to flourish without official protection, and the large revenues that such enterprises earn * * * enable them to dangle attractive bribes before policemen and other officials. The effectiveness of the kingpin statute might therefore be reduced if a kingpin's police protectors, such as [petitioners], whose efforts enabled large drug

> enterprises to flourish brazenly for years, could never be punished as aiders and abettors.

The court went on to hold, however, that the district judge had erred in assuming that aiders and abettors of a CCE offense are subject to the 10-year mandatory minimum no-parole sentence provision of the CCE statute, 21 U.S.C. 848(a). Holding that the decision whether to impose such a sentence is discretionary, the court of appeals remanded for resentencing (*id.* at 4a-8a).

Judge Wood dissented in part (Pet. App. 14a-19a). Although Judge Wood agreed with the majority that aiders and abettors of a CCE offense who are not themselves kingpins may be prosecuted under the CCE statute, he disagreed with the majority's view that such persons are not also necessarily subject to the statute's special sentencing provisions.

ARGUMENT

1. Petitioners first attack (Pet. 5-9) the court of appeals' holding that aiders and abettors of a CCE are not automatically subject to the mandatory minimum sentence provision of 21 U.S.C. 848. Petitioners assert (Pet. 6) that this holding will do serious "damage to law enforcement interests." Petitioners, however, were not aggrieved by this aspect of the court of appeals' decision; on the contrary, they benefited from it. They have no cause to seek review of this holding.

2. Petitioners next contend (Pet. 10-14) that it is impossible to aid and abet a violation of 21 U.S.C. 848. However, nothing in the language of 21 U.S.C. 848 or the aiding and abetting provision, 18 U.S.C. 2, supports this view, and it is well established that, with some exceptions not pertinent here, the aiding

and abetting statute is "applicable to the entire United States criminal code."[1] *Breeze* v. *United States*, 398 F.2d 178, 192 (10th Cir. 1968). See also, *e.g.*, *United States* v. *Jones*, 678 F.2d 102, 105 (9th Cir. 1982); *United States* v. *May*, 625 F.2d 186, 194 (8th Cir. 1980). Had Congress intended to carve out an exception to this rule for the CCE statute it presumably would expressly have so indicated in the statute's language or legislative history, but there is no such indication.

It is of course true that petitioners do not qualify as drug kingpins, the group specifically targeted by the CCE statute. But it is settled that nonmembers of the class at which a particular criminal statute is directed can nonetheless violate the statute on an aiding and abetting theory. Thus, for example, in *Standefer* v. *United States*, 447 U.S. 10 (1980), this Court upheld the defendant's conviction for aiding and abetting a violation of 26 U.S.C. 7214(a)(2), which makes it a crime for "[a]ny officer or employee of the United States acting in connection with any revenue law of the United States [to receive] any fee * * * for the performance of his duty except as

---

[1] There are three exceptions to this rule. See *United States* v. *Southard*, 700 F.2d 1, 19-20 (1st Cir.), cert. denied, 464 U.S. 823 (1983). The first exception is for the victims of the crime. 700 F.2d at 19. The second is for members of the group the criminal statute was designed to protect, such as a woman who is transported willingly across state lines for the purpose of engaging in illicit sexual intercourse in violation of the Mann Act. *Id.* at 19-20. And finally, the aiding and abetting statute does not apply to persons whose participation in the crime is essential to its commission under the statutory definition of the offense. *Id.* at 20. It is this last exception that exempts the employees of the kingpin from prosecution under the CCE statute on an aiding and abetting theory. See Pet. App. 3a.

provided by law," even though the defendant was not a government employee and even though the bribed employee previously had been acquitted. See, also, *e.g.*, *Busic* v. *United States*, 446 U.S. 398, 411-412 n.18 (1980); *United States* v. *Ruffin*, 613 F.2d 408, 413 (2d Cir. 1979); *Wilson* v. *United States*, 230 F.2d 521, 526 (4th Cir.), cert. denied, 351 U.S. 931 (1956).

The legislative history of the CCE statute is completely consistent with the court of appeals' holding that a CCE conviction may be obtained on an aiding and abetting theory. The report of the Senate Judiciary Committee stated that "[t]he [CCE] defendant must also have occupied a position of organizer or assumed a management role *such as a hit man.*" S. Rep. 91-613, 91st Cong., 1st Sess. 28 (1969) (emphasis added). This suggests that Congress intended Section 848 to reach "independent contractors" who, by virtue of the specialized functions they perform for the enterprise, are indispensable to its success, even though they are not supervisors in the ordinary sense. As the court of appeals observed (Pet. App. 3a-4a), "[t]he effectiveness of the kingpin statute might * * * be reduced if a kingpin's police protectors, such as [petitioners], whose efforts enabled large drug enterprises to flourish brazenly for years, could never be punished as aiders and abettors." [2]

---

[2] Petitioners make much of the fact that the CCE statute, as originally proposed, was a sentence enhancement provision, arguing (Pet. 11) (emphasis in original) that "the enhanced penalties provided in a *penalty* provision of [a] drug statute [cannot] be applicable to anyone but the kingpins [for whom they were designed]." But the legislative history of Section 848 makes clear that, as ultimately enacted, it is not a sentencing statute directed at drug kingpins but a statute defining a "new and distinct offense." H.R. Rep. No. 91-

Petitioners express concern (Pet. 12) that, under the court of appeals' decision, individuals who aid and abet the drug enterprise in a minor way would be subject to the harsh penalties of the CCE statute. The decision below does not sweep this broadly. Because subordinates within a CCE may not be convicted of aiding and abetting the kingpin, it follows that outsiders who play subordinate roles likewise may not be convicted. On the other hand, individuals who aid and abet the kingpin in organizing, supervising, or managing the CCE (21 U.S.C. 848(b)(2)(A)) may be convicted. Petitioners in this case were in no sense the kingpin's subordinates; nor did they aid and abet him in a subordinate role or furnish only occasional or incidental assistance. See Pet. App. 3a (majority), 16a (Wood, J., concurring in part and dissenting in part). On the contrary, they provided continuing and indispensable aid through the use of an entirely independent power base, the Chicago police department. Accordingly, the court of appeals' decision holding them culpable as principals will not lead to the prosecution or conviction of minor figures as aiders and abetters of a CCE.

Finally, the court below is the only court of appeals to have considered the issue of whether a CCE prosecution may rest on an aiding and abetting theory. Thus, there is no circuit conflict on the issue, which

---

1444, 91st Cong., 2d Sess. 84 (1970). See also U.S. Br. at 25-30, *Garrett* v. *United States*, No. 83-1842 (argued Jan. 16, 1985). (We are serving petitioners with a copy of this brief.) Congress must be presumed to have realized that one of the consequences of creating this new offense was to allow prosecution on an aiding and abetting theory unless affirmative action was taken to prevent this result.

might ultimately prove to be nonrecurring.[3] In these circumstances, review of the issue by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

MAY 1985

[3] Indeed, we know of only one other CCE case in the 15-year history of the statute in which the government has relied on such a theory. *United States* v. *Mitchell*, No. CR 83-130 (N.D. Cal. 1983). While the indictment was dismissed against the alleged aiders and abettors, the defendants so charged were not independent operators such as the police officers in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461931 10220